NO. 22133

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GEORGE CHARLES MATTHEWS,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant to be guilty as charged in all three counts of a Three-Count indictment following trial by jury (C.T. 27).[1/] Judgment of acquittal was granted as to Count Three as to appellant after the trial ended. (C.T. 31).

The offenses occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 3231, 2313 and 545. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

1/ "C.T." refers to Clerk's Transcript.

II

STATEMENT OF THE CASE

Appellant was charged, together with Robert Cleburne May, Jr., in each Count of a Three-Count indictment returned on January 18, 1967, by the Federal Grand Jury for the Southern District of California. The First Count alleged that on December 20, 1966 May, and appellant knowingly and intentionally transported a stolen 1961 Chevrolet in foreign commerce from Los Angeles, California, through the Southern District of California, to Tijuana, Baja California, Mexico. (C.T. 2).

The Second Count alleged that on December 21, 1966 May and appellant with knowledge and intent transported the same stolen 1961 Chevrolet in foreign commerce from Tijuana, Baja California, Mexico to San Diego County in the Southern District of California. (C.T. 3).

The Third Count, on which a judgment of acquittal was granted, alleged that May and appellant knowingly and wilfully smuggled sixty amphetamine tablets into San Diego County from Mexico. (C.T. 4).

Jury trial of May and appellant commenced on March 10, 1967 as to all three counts before United States District Judge William P. Copple. May and appellant were found guilty as charged on all three counts on March 13, 1967. (C.T. 9). A written motion for judgment of acquittal, as to Count Three only, (C.T. 30), filed on March 23, 1967, was granted by Judge Copple on March 27, 1967 (C.T. 31).

Thereafter, on April 17, 1967, May and appellant were each committe to the custody of the Attorney General under Title 18, United States Code,

Section 5010(b), Federal Youth Corrections Act for an indeterminate sentence. (C.T. 32, 33).

Appellant filed a Notice of Appeal on April 18, 1967 (C.T. 35). An Order was filed on May 4, 1967 permitting appellant to proceed In Forma Pauperis (C.T. 38).

III

ERROR SPECIFIED

Errors as alleged by appellant are paraphrased as follows:

1. There was insufficient evidence of knowledge by appellant to sustain his conviction.

2. Prejudicial error was committed by the Trial Court in its failure to instruct the jury that circumstantial evidence may support a conviction only if it is sufficient to enable a reasonable determination that it excludes every reasonable hypothesis except that of guilt.

IV

STATEMENT OF THE FACTS

On December 21, 1966 at about 11:00 p.m. (R.T. 73) [2/] appellant together with Robert Cleburne May, Jr. entered the United States from Tijuana, Baja California, Mexico in a 1961 Chevrolet automobile (R.T. 55).

Howard Nolan, an experienced Customs Inspector, referred them to the Secondary Inspection point after the driver, May, informed him they had no key to the trunk. May showed Nolan this particular car could be started without a key. Nolan noted that "There was no key available or in sight."

2/ "R.T." refers to Reporter's Transcript.

Nolan found the pills charged in Count Three under the dash (R.T. 56). Upon questioning, May said "The car is my mother's car." (R. T. 62)

Wayne Tilton, an officer of the San Diego police department advised appellant of his constitutional rights (R.T. 34). He asked Matthews who the car belonged to. Matthews replied "It belongs to his mother", indicating Mr. May. (R.T. 44, 48).

Officer Tilton testified the vehicle was a green 1961 Chevrolet, Four-Door, bearing California license MDS-518. (R. T. 52)

Ralph Byrd owned the 1961 Chevrolet bearing California license MDS-518 (R.T. 13). He had purchased the car when it was new. Byrd parked his car at 11:00 A.M. on December 21, 1966 (R.T.15) the same date of appellant's return from Mexico in the stolen vehicle. (R.T. 54)

Two hours later, his vehicle was missing. He reported the car stolen immediately. Bryd had never met May nor appellant and didn't give them or anyone else permission to take his car. (R.T. 16). No one ever borrowed his car (R.T. 20). Byrd has a crippled hand and doesn't use a key. (R.T. 18).

Mr. Byrd testified the vehicle was last seen near where Mary Goldbaum knew May had lived with his sister and also near where appellant testified he and May were looking for a car to buy. (R.T. 17, 148).

Gary Samuel, Special Agent F. B. I. tried to locate Bill and Mary from February 8, 1967 until the Trial (R.T. 80, 83). Samuel discussed Bill with Mary (R.T. 84).

Mary Goldbaum testified that May lived in the middle of her block, 5 or 6 houses away (R.T. 90, 91). She saw May and appellant at her house Saturday, the 14th of December. (R.T. 91). She had no party at her house on December 17th (R.T. 29, 96). No one named "Bill" was there. (R.T. 93).

Goldbaum was visited by appellant and Mrs. Persiata at the Doughnut Shop where she worked (R.T. 94). She knew May by "R.C." Appellant and Persiata wanted Goldbaum to say appellant was at her house. (R.T. 95). She remembered the 17th because she put up her Christmas tree that day. (R.T. 96).

The only people at her house on Wednesday, the 21st, were Mary Ellen and her boy friend (R.T. 96). May's sister lives there and May just moved in and lived there three weeks (R.T. 101).

Mary Ellen Cicarelli testified that she lived in El Monte in the same block Miss Mary Goldbaum lived in. Miss Goldbaum lived at the corner of Rose and Shirley Streets. (R. T. 116-117)

Miss Goldbaum got her Christmas tree on Saturday, December 17, 1966 (R.T. 116-117). She knew Mr. May and he lived near her. She also recalled December 21, 1966 (R.T. 116-118).

She sees Mary every day (R. T. 121) and is at her house every day. (R.T. 127). She attended all of Mary's parties and never saw a "Bill" at any of Mary's parties (R.T. 123-124).

Dorothy Persiata testified she saw May and appellant Matthews with a man named "Bill" in possession of the 1961 Chevrolet at 5:00 p.m. on December 21, 1966 at her home at 615 North French Street in Santa Ana,

California. No woman was with them. (R.T. 120, 134).

She admitted that she and appellant contacted Mary Goldbaum at work concerning Miss Goldbaum's story. (R.T. 134). She didn't ask Mary where "Bill" could be located (R.T. 141).

Mrs. Persiata denied that May stayed at her house (R.T. 137). She admitted she was a good friend of May and his mother (R.T.) and felt "pretty strongly about this case," and would like to see May acquitted. (R.T. 137, 140). May and May's mother had dinner at her house (R.T. 142).

May and appellant testified they spent the night of December 20, 1966 at Mary's sister's near El Monte. (R.T. 148, 201, 202). They looked at a car near Mary's house (R.T. 149, 168). They claimed they met "Bill" at Mary's house on December 21, 1966 (R.T. 149, 150, 170-171) and went to Mexico with him and four other persons, one of whom was nemd Louise Garcia (R.T. 150, 164, 185). May told Bobby Turnage, F. B. I., a woman was along. (R. T. 205)

None of these five other persons testified (R.T. i and ii), neither told the officers about the other five persons, even after appellant thought the car was stolen. Both gave Mrs. Persiata's residence (R.T. 199-200) as their address (R.T. 162-163, 190). Both admitted lying to the officers in saying the car belonged to May's mother (R.T. 153-154, 180).

May claimed they stayed three nights with Mrs. Persiata and appellant claimed they stayed there only two nights. (R.T. 163, 186, 201).

May had been convicted of a felony involving automobile theft. (R.T. 148, 159-161).

May told Bobby Turnage, Special Agent, Federal Bureau of Investigation, a girl named "Bambi" was along (R.T. 205). He didn't mention a Louise Garcia or anyone else besides himself, appellant "Bill" and Bambi. He didn't mention two cars on the trip (R.T. 205). Turnage said the F.B.I. had been unable to locate a "Bill" (R.T. 206, 211). Turnage talked to May at his request on two occasions. He never mentioned "Bill" and Bambi on the first occasion. May told Turnage all four went down in the 1961 Chevrolet (R.T. 209, 210).

V

ARGUMENT

A. THE EVIDENCE OF KNOWLEDGE ON THE PART OF APPELLANT WAS SUFFICIENT TO SUSTAIN THE CONVICTION.

It is well settled that on appeal, the evidence is viewed most favorable to the government.

Glasser v. United States, 315 U. S. 60, 80 (1942)

Bolen v. United States, 303 F.2d 870 (9th Cir. 1962)

No matter what view of the evidence is taken, the evidence is clear that appellant and May entered the United States from Mexico on December 21, 1966 at 11:00 p.m. as the sole occupant of a 1961 Chevrolet automobile that was stolen from Ralph Byrd between 11:00 a.m. and 1:00 p.m. the same date.

Recent sole or joint, actual or constructive possession of a stolen automobile is sufficient to prove knowledge the automobile was stolen unless the possession is explained to the satisfaction of the Jury.

Wilson v. United States, 162 U.S. 613 (1896)

Morandy v. United States, 170 F.2d 5 (9th Cir. 1948), cert. denied 336 U. S. 938

McNamara v. Henkel, 226 U. S. 523 (1913)

Corey v. United States, 305 F.2d 232 (9th Cir. 1962)

Jones v. United States, 378 F.2d 340 (9th Cir. 1967)

The Jury, in view of their guilty verdict as to both May and appellant after deliberating only 2-1/2 hours (R.T. 242, 244) no doubt found the entire operation a joint venture.

Apparently they found May and appellant were close friends and associates.

They were to be admittedly looking for an automobile near where the automobile was stolen. They had very little money. (R.T. 149, 168)

Both admitted their original claim to officers was false that the vehicle in question belonged to May's mother. This was after appellant admittedly thought the officers suspected the car was stolen. (R.T. 17, 34, 44 48).

Both gave Mrs. Persiata's address as their residence (R.T. 162, 183, 190) and claimed to have stayed there three nights immediately prior to their arrest. Neither claimed to reside there.[3/] Mrs. Persiata, a close friend May and his family said they didn't stay at her house, but claimed May and appellant together with "Bill" visited at her house on the way to Tijuana. (R. T. 137). May and appellant claimed to have met "Bill" at a party at May Goldbaum's house on December 21, 1966. (R.T. 149, 150, 170, 171).

3/ (R.T. 162-163, 190)

Mary Goldbaum and her friend testified that neither "Bill", May, nor appellant was at her house on December 21, 1966. Both also testified no one named "Bill" was ever at a party at Mary's house. (R.T. 93, 96, 123-124). "Bill" couldn't be found by Federal Bureau of Investigation (R.T. 206, 211).

Exculpatory statements, later shown to be false, points to a consciousness of guilt.

See: 8.14 Federal Jury Practice and Instructions, Mathes and Devitt and the cases cited therein.

Appellant and Mrs. Persiata visited Miss Goldbaum and tried to get her to back up appellant's story which she refused to do. (R.T. 94, 95).

None of the five other persons May and appellant claimed accompanied them to Tijuana testified.

Appellant made no motion for judgment of acquittal or a motion for a new trial at the close of the Government's case, at the close of the appellant's case nor after instructions were given at the close of the trial. The Court invited such a motion on more than one occasion.

Failure to make such a motion waives any claim to insufficiency of the evidence on appeal.

Corey v. United States, supra at 273

"The evidence was not insufficient merely because the jury might have drawn different inferences or arrived at a different conclusion."

This same case at 238 said,

"The elaborate efforts to conceal the use of assumed names, and the explanations inconsistent with objective circumstances clearly

indicate their falsity were also commonly recognized badges of fraud from which the jury could infer quilty knowledge."

In the Corey case the conviction of Mrs. Fulgreen was sustained although not in possession of any of the stolen jewelry.

In another Dyer Act case, it was said:

"Inconsistent statements made by appellant and other testimony in the case, however, cast doubt both upon the reasonableness of his explanation and upon his credibility."

Keyes v. United States, 314 F.2d 119, 122 (9th Cir. 1963)

B. THE COURT DID NOT COMMIT REVERSIBLE PREJUDICIAL ERROR IN FAILING TO INSTRUCT THAT CIRCUMSTANTIAL EVIDENCE MUST EXCLUDE EVERY REASONABLE HYPOTHESIS EXCEPT THAT OF GUILT.

Appellant concedes that no objection was made to the instructions as given by the court. (A.B. 11).[4/] This constitutes a waiver of such claim.

Failure to so instruct does not consitute reversible error.

Holland v. United States, 348 U.S. 121, 138-139 (1954)

Bismo v. United States, 299 F.2d 711, 722 (9th Cir. 1962)

Strangway v. United States, 312 F.2d 283 (9th Cir. 1963)

Armstrong v. United States, 327 F.2d 189, 194-195 (9th Cir. 1964)

Ramirez v. United States, 350 F.2d 306, 307 (9th Cir. 1965)

4/ "A.B." refers to Appellant's Brief

While some cases appear to hold such an instruction may be desirable, there is no error where the court properly instructs on "reasonable doubt" as was done in this case. It is noted the court used and discussed the term "reasonable doubt" on at least 17 occasions.

Except for the element of knowledge the vehicle was stolen, this was not a circumstantial evidence case. Rarely if ever can knowledge or intent be proven other than by circumstantial evidence.

See: 10.06 Federal Jury Practice and Instructions.

Also, see the reasoning in Sanchez v. United States, 341 F.2d 565 (5th Cir. 1965) where, as in this case, a substantial part of the evidence was direct.

"Such an instruction should never be given unless the evidence is not wholly circumstantial."

The court not only held that failure to give such an instruction was not plain error but not error at all.

Leyvas v. United States, 264 F.2d 272 (9th Cir. 1958)

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted tha the jury verdict of guilty in the Court below should be affirmed.

Respectfully submitted,

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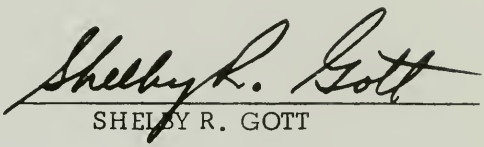
CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



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